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Nos. 76-419 and 76-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION, *Petitioner,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, *Respondents.*

No. 76-528

CONSUMERS POWER COMPANY, *Petitioner,*

v.

NELSON AESCHLIMAN, SAGINAW VALLEY NUCLEAR STUDY GROUP, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF CONSUMERS POWER COMPANY IN NO. 76-419 TO MOTION FOR LEAVE TO MAKE POST-ARGUMENT FILING AND SUGGESTION OF MOOTNESS AND MOTION TO DISMISS WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED

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While the Suggestion of Mootness and Motion to Dismiss the Writ of Certiorari as Improvidently

Granted is filed only in respect to No. 76-419, *Vermont Yankee Nuclear Power Corporation* v. *Natural Resources Defense Council, et al.*, and indeed only to the extent to which the writ in that case sought review of the decision of the court below in *Natural Resources Defense Council, et al* v. *Nuclear Regulatory Commission*, No. 74-1385, it may be of assistance to the Court to make clear that the contentions there advanced do not apply to the writ of certiorari in No. 76-528, *Consumers Power Co.* v. *Aeschliman*. Even if the Court should decide that the issue of the validity of the fuel cycle rule is now moot as to Vermont Yankee, that issue would not be moot as concerns the construction permits for Consumers' Midland Nuclear Power Plant.

In the *Consumers* case, unless the decision below is reversed by this Court, hearings will be held on the three issues remanded to the Commission by the court below and discussed in our brief—energy conservation, the Advisory Committee report, and the fuel cycle.[1] Consumers' construction permits, which are challenged by the non-federal respondents, are at risk in those hearings. If the court below erred, as Consumers contends, Consumers' construction permits are valid, and it may proceed with construction freed from not only the further hearings, but also the risk that its construction permits may be suspended until those hearings are ended.[2] For this reason, the state-

[1] The hearings which have been held in the Consumers proceeding since the decision below have been concerned only with the issue whether Consumers' construction permits should be suspended pending the further hearings on the remanded issues.

[2] The decision of the Licensing Board refusing to suspend the construction license has been appealed by the non-federal respondents to the Appeal Board, where it is presently pending awaiting decision.

ment in the Suggestion of Mootness to the effect that the Commission's actions following the decision below have brought about a situation in which Vermont Yankee now continues to hold its operating license "subject to the same limitations and conditions to which all Commission licenses are subject . . ." (p. 3; footnote omitted), whatever its validity in the context of the Vermont Yankee situation, cannot be made with respect to the Midland construction permits.

The Court should also be aware that, so far as concerns the fuel cycle issue, the decision of the court below in No. 74-1586 is read with the Consumers proceeding (Jt. App. p. 109).[3] That decision has been challenged in Consumers' briefs in this Court, and constitutes part of the mandate directed to the Commission in the Consumers proceeding. This aspect of the further challenge to Consumers' permits which has been mandated by the court below would be ended by a decision by this Court that the Commission need not be concerned, under NEPA, with the ultimate disposition of the spent fuel (Br. p. 40) or, alternatively, that the legislative-type hearing under which the rule-making in this issue was conducted was a valid exercise of the Commission's power (Br. pp. 41-46).

So far as the latter issue is concerned, the fuel cycle rule here at issue and which we believe to be valid expressly provides that Table S-3 will not be required to be applied retroactively to nuclear power

[3] Consumers is also a party-intervenor in that proceeding (Jt. App. p. 6).

plants like Midland because the Commission concluded "that the environmental effects of the uranium fuel cycle has been shown to be relatively insignificant . . ." (Jt. App. pp. 395, 398). The court below was aware of this (Jt. App. p. 42, n. 19). It recognized that NEPA has not precluded the Commission from limiting the consideration of the environmental effects of the fuel cycle—including the effects of reprocessing and waste disposal—to generic rulemaking proceedings so long as such matters are given "adequate consideration" (Jt. App. pp. 39-40, n. 17). *See also, Potomac Electric Power Company* (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB 218, 8 AEC 79, 85 (1974); Appendix to Petition for Certiorari in No. 76-528, pp. 286, 294.

Finally, the Commission has taken no action since the issuance of the decisions below which would require the fuel cycle issue to be reconsidered in the Midland proceeding if the original fuel cycle rule should be upheld by this Court. The interim S-3 promulgated by the Commission is, by its terms, effective only after March 14, 1977, and is not applicable to environmental reports submitted prior to June 6, 1974 (Fed. Reg. Vol. 42, pp. 13806-7).

Respectfully submitted,

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